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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re) Adversary Case No. 10-01206-bam
)
JUAN C. BRACAMONTES-GALINDO) Chapter 7 Bankruptcy
) Case No. 10-17804-bam
Debtor.)
)
MARCELINO MARTINEZ,)
)
Plaintiff,)
)

**REPLY TO OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT
AND ORDER; AND OPPOSITION TO COUNTERMOTION TO REMAND
OR IN THE ALTERNATIVE, ABSTAIN FROM HEARING THE MATTER
OR EXERCISE JURISDICTION OVER THE ADVERSARIAL PROCEEDING**

Comes now Juan C. Bracamontes, (the “Debtor”) in the above-captioned proceeding, files this Reply (the “Reply”) to Motion for Relief From Judgment and Order and Opposition to Countermotion to Remand or in the Alternative, Abstain from Hearing the Matter or exercise Jurisdiction over the Adversal Proceeding set for June 30, 2010 before Judge Bruce A. Markell and Motion to Consolidate filed cases (the “Motion”).

1
2 **NEVADA REVISED STATUTES CHAPTER 40**

3 In reviewing the order of the Court filed January 30, 2010, prepared by Mr.
4 Perez, there is one glaring omission exists with respect to unlawful detainer: there is no finding
5 of fact or conclusion of law that Bracamontes is guilty of unlawful detainer. NRS Chapter 40
6 does not apply.

7 While the conclusions state that Bracamontes has no possessory rights to the
8 property, is in breach of contract, and owes money, and that notices were sent pursuant to the
9 unlawful detainer action (see page 4 of the Findings of Fact, Conclusions of Law and Order
10 Granting Summary Judgment in Plaintiff's Favor on all Causes; **Exhibit "1"** of Martinez's
11 brief), the language necessary to issue the writ that Bracamontes was guilty of unlawful
12 detainer is not found in the order.

13 Looking at Martinez's Third Cause of Action in his Verified Complaint (**Exhibit**
14 **"2"** of the Opposition/Countermotion for the Relief of Judgment), he alleges jurisdiction under
15 NRS Chapter 40 and allege that he has stated grounds for a permanent writ of restitution (see
16 page 3 and 4). Martinez asserts that because he received a permanent writ as opposed to a
17 temporary writ under the guise of a summary judgment, that somehow validates the district
18 court's decision.

19 The applicable portions of NRS Chapter 40 start at 40.215 which sets forth what
20 types of situations Chapter 40 applies to.

21 In summary, 40.230 provides for application in cases of forcible entry, and
22 40.250, 40.251, and 40.252 provide for application in situations of rent.

23 NRS 40.255 provides for application where property has been sold.

24 Nowhere in NRS Chapter 40 does it provide for an unlawful detainer action be
25 brought in the case, as here, of a civil dispute arising out of a contract where no foreclosure has
26 occurred and no right to immediate possession has been obtained.

The clear language of the Complaint and the contract places the Debtor, Juan Bracamontes-Galindo, in legal possession of the property. A breach of contract or failure to pay the note does not give a right of possession to Martinez. As of this date there is no legal right of possession which flows from default or an unsecured note.

The documents clearly do not make the possession a rental, and the contracts in question to not provide for surrender of the property or conversion to a rental upon default. Lippis v. Peters, 112 Nev. 1008, 921 P.2d 1248 (1996), clearly establishes that due process applies to eviction in Nevada.

In order for Bracamontes to be evicted, as the Complaint sounds in contract, Martinez must first get a judgment and proceed to a sale, at which time NRS Chapter 40 would provide a remedy or obtain a declaratory judgment. It does not apply to a mere breach of contract, and the contract provides no basis for eviction, let alone the summary eviction set forth in the orders. A declaration of a right to possession only commences the unlawful detainer, it does not resolve it.

Making the jump from a breach of contract to an unlawful detainer remedy, a writ of restitution, was the basis for a void order.

Thus, either NRS 40.300 was not complied with or the order is void and subject to being set aside pursuant to FRCP 60.

DAMAGES

Again, Martinez claims that there is adequate justification for an award of \$42,500 in damages.

Reading the documents submitted by Martinez in the underlying court, the finding of fact on damages states that it is equating 17 months for which Plaintiff has been denied use of the property, according to the damages of \$2,500 times 17 months for a total of \$42,500.

That damage figure is the same amount of interest to be paid under the contract.

1
2 There is no finding that the reasonable rental value of the property was \$2,500.
3

4 The Order does not calculate contact damages but loss of use damages. There is
5 nothing which supports the Court's calculation that the loss of use had a value of \$2,500 a
6 month. That is the figure alleged to be the interest on the loan.
7

8 Martinez also protests that it would be an ethical violation to ask for anything
9 other than damages over \$10,000.
10

11 The rule, however, does not apply to special damages; rather it applies to
12 general damages.
13

14 Calculations based thereupon of special damages are properly specified in the
15 Complaint. The position of Martinez that it would be a violation of Nevada rules to have stated
16 a specified amount of damages would be incorrect.
17

18 General damages must be pled in terms of excess of \$10,000. Special damages
19 and economic damages, however, should be pled with specificity.
20

21 The court could not enter, based upon the Complaint and pleadings, and the
22 absence of evidence on the amount of damages, the award for \$42,500.
23

24 The affidavit of Mr. Martinez does not state the reasonable rental value (see
25 paragraphs 5, 8, and 12 of the Affidavit of Marcelino Martinez; Martinez's Opposition Exhibit
26 "3").
27

28 The \$2,500 figure is a figure taken from the contract, and at no point are
damages supported in that amount.

22 **THE ORDER WAS OBTAINED BY A FRAUD**

23 The "Agreement to Sell Property" (Martinez Complaint Exhibit "4") is a
24 forgery, and per Torrealba v. Kesmetis, 178 P.3d 716 (Nev. 2008), Martinez cannot benefit
25 thereby.
26

27 The document is clearly forged as it refers to a payment being made on
November 1, 2005, but it was notarized on September 29, 2005.
28

1
2 Clearly the document is fraudulent and must be ignored and in that it served as
3 the basis for the order in question, the order was obtained by a fraud.

4 **OPPOSITION TO COUNTERMOTION**

5 The Countermotion errs with respect to the merits

6 Martinez asserts in his countermotion his claim is meritorious based on a forged
7 document claiming title would pass on final payment.

8 As noted above, this is a facial forgery, and the remaining documents are
9 indicative of a completed sale and a breach by Martinez.

10 Of note here is that the Martinez claims there were admissions that title would
11 not pass until the final payment because in his answer he admitted that under the terms of one
12 of four documents title would not transfer until the last payment. A question of fact exists with
13 respect to what contract is the final contract, as there were several documents dated September
14 29, 2005, including the Agreement to Sell Property containing that language, Real Estate
15 Purchase Contract Residential (**Exhibit "5"**), a Consumer Loan Agreement (**Exhibit "6"**), and
16 a Promissory Installment Note (**Exhibit "7"**). Taken together in a logical context it would
17 appear that the execution of the Promissory Note completed the contract for sale. In which
18 these here document take priority. This will need to be addressed by the Court in the future. As
19 noted, Exhibit "1" is self contradictory.

20 The documents contain an Agreement to Sell Property and a Real Estate
21 Purchase Contract Residential.

22 The "Agreement" is for \$30,000 more than the "Contract." Both are signed the
23 same day.

24 It appears from the documents that the Agreement is superseded by the Contract
25 or is fraudulent and clearly is void on its face as it states that payment was made on November
26 1, 2005, but the document is notarized September 29, 2005.

27 The terms of the Contract were fulfilled by the execution of the note.

1
2 The Agreement is a forgery as it acknowledges a payment of \$30,000 on
3 November 1, 2005, on a document notarized on September 29, 2005. The Agreement is
4 fraudulent and cannot be enforced.

5 **THE MATTER IS A CORE PROCEEDING**

6 Since the last court hearing in addition to the motion now before the court,
7 Bracamontes has filed amended schedules listing the property as an asset.

8 Bracamontes has filed before the hearing a motion for leave to file an amended
9 answer and counterclaim against Martinez.

10 While the substance of this action has always been a CORE proceeding, any
11 questions as to whether or not this is a core proceeding are resolved thereby. See part (C) 28
12 U.S.C. 157(b)(2)C)(E).

13 This Court should retain jurisdiction and allow the answer and counterclaim to
14 be filed, which will be before the Court at the time of hearing hereon.

15 DATED this 4th day of August, 2010.

16 SULLIVAN BROWN by
17 CHRISTOPHERSON LAW OFFICES

19 _____
20 /s/ Ian Christopherson
IAN CHRISTOPHERSON, ESQ.
21 Nevada Bar #3701
3430 East Flamingo Road, #212
Las Vegas, NV 89121

1
2 **CERTIFICATE OF SERVICE**
3

4 I HEREBY CERTIFY that a true and correct copy of the REPLY TO
5 OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT AND ORDER; AND
6 OPPOSITION TO COUNTERMOTION TO REMAND OR IN THE ALTERNATIVE,
7 ABSTAIN FROM HEARING THE MATTER OR EXERCISE JURISDICTION OVER THE
8 ADVERSARIAL PROCEEDING has been served by Electronic Notice on the 5th day of July,
9 2010, to the following:

10 Frank Perez, Esq.
11 McCullough, Perez & Associates, Ltd.
12 601 South Rancho Drive, #A019
13 Las Vegas, NV 89106
chrislaw@mcpalaw.com

14 U.S. TRUSTEE - LV - 7
USTPRegion17.LV.ECF@usdoj.gov

15 ACE C VAN PATTEN on behalf of Creditor DEUTSCHE BANK NATIONAL TRUST
16 COMPANY, AS TRUSTEE FOR ARGENT SECURITIES INC., ASSET-BACKED
17 PASS-THROUGH CERTIFICATES, SERIES 2005-W4
avanpatten@piteduncan.com, avanpatten@piteduncan.com

18 YVETTE WEINSTEIN
yweinsteinhsd@earthlink.net, NV08@ecfcbis.com

20 I HEREBY CERTIFY that a true and correct copy of the above reference has been served
21 Regular U.S. Postage on the 5th day of July 2010, to the following:

22 GILBERT B. WEISMAN on behalf of Creditor ECAST SETTLEMENT
23 CORPORATION
24 PO BOX 3001
25 MALVERN, PA 19355-0701

26 _____
27 /s/ SONIA LUCERO
28 An Employee of
 SullivanBrown